

## Ohio's Modern Death Penalty—From Architect to Opponent

Justice Paul Pfeifer\*

Ohio's death penalty statute has, in practice, resulted in a "death lottery" that should be abandoned. In fact that may have just happened. Will there ever be another state-imposed execution in Ohio's history? For a variety of reasons, hopefully not. Legislative repeal currently seems a bridge too far because repeal is not nearly as easily done as enactment. Rather, I expect few will notice the expiration of Ohio's death penalty; it's just as well.

So how does one move from, in 1981, being a principal architect of Ohio's death penalty statute as the Ohio Senate Judiciary Chairman to opposing that statute's continued use? Why the change of position? Was there an epiphany or sudden moment of legal or moral clarity? There was not. My evolution was a slow process of reflection that unfolded during my subsequent professional life.

Actually, the first cracks occurred during the drafting and enactment process. I had invited Ohio State Law Professor Lawrence Herman to testify before the Judiciary Committee. Professor Herman had taught my constitutional law class when I was a student and I had always admired his teaching and advocacy skills. He was an opponent of the legislation, but was willing to instruct us on the need to narrowly tailor the death penalty to prevent yet another rejection by the United States Supreme Court.

Professor Herman openly worried that he might be helping construct an enactment that would later be deemed constitutional by subsequent reviewing courts. To date, that has been the exact result from all constitutional challenges. He argued that felony-murder as a death specification was bootstrapping or double counting, but his advice was rejected. That argument remains today one of the principal criticisms of the Ohio statute, rendering it far too broad in its reach.

The second crack came during the final legislative markup in the conference committee that I chaired. House Judiciary Chairman Terry Tranter insisted on deleting the "life sentence without possibility of parole" as an option for juries to consider as an alternative to the death penalty. That provision had been in all Senate drafts but was rejected by the House and Tranter refused to yield. Several years later

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\* Executive Director, Ohio Judicial Conference. Former Ohio Supreme Court Justice (1993–2016); former member of the Ohio House of Representatives (1971–72) and Ohio Senate (1977–92). Credit for this article must be shared with Andrew Welsh-Huggins who has for decades studied the application and flaws of Ohio's modern death penalty statute and written volumes on the subject. His probing questions over the years stirred my continued evaluation of the efficacy of the statute I had so proudly guided into enactment. Information not otherwise cited comes from his book on the subject. See ANDREW WELSH-HUGGINS, *NO WINNERS HERE TONIGHT: RACE, POLITICS, AND GEOGRAPHY IN ONE OF THE COUNTRY'S BUSIEST DEATH PENALTY STATES* (2009).

the General Assembly did add "life without parole" as an alternative to a death sentence, but not before dozens of defendants were sentenced to death in cases where their juries did not have that option.

During the following decade I used my involvement in restoring the death penalty in Ohio as a part of my political bio in three unsuccessful statewide races—U.S. Senate in 1982, Governor in 1986 and Attorney General in 1990. However, during that period I had also argued unsuccessfully against abandoning the use of the electric chair as the means of death. It was my theory that state executions should be disquieting and uncomfortable for both the public and for the defendant, and therefore, likely used in only the most extreme cases. Had that subsequent legislative change in manner of death not been adopted, it is clear today that there could never have been even a single execution under the new act.

In January of 1993, I began what became twenty-four years of service as a Justice of the Ohio Supreme Court. Judicial office had never been a personal goal, but to paraphrase Robert Frost, in life way somehow leads on to way. By that time "death row," which I had visited as Chairman of the legislature's Prison Inspection Committee, was already well-populated. Two surprises occurred when the first death penalty case during my tenure was argued and then discussed in conference. First, there was no database at the Supreme Court to compare the nature of the events and the life history and race of the defendant with all prior death penalty cases. Second, the discussion by the justices focused entirely on technical trial and due process issues. There was absolutely no discussion of, or individual independent evaluation made, regarding the question of imposition of death.

I was shocked. In response to the first issue, I was informed that the statutory mandate that data regarding death-eligible cases be forwarded to the Supreme Court had never been followed. We had included that mandate in the statute to assuage the fears voiced by many opponents that the statute would be applied unfairly as measured by race. Not the Court's fault I was told, the locals had just never forwarded the data. Regarding the statutory mandate that the Supreme Court independently evaluate whether each defendant was death-worthy, the answer of my new colleagues was simple: All of these death penalty defendants have committed horrible crimes. If their actions fit the specifications set forth in the statute how can we possibly find that some defendants are less worthy of death than others?

Thankfully, over time the Court evolved and instead of just tossing off boilerplate language, it now actively engages in case-by-case, independent weighing of the crime circumstances and the defendant's life history in concluding whether death is warranted. Age, mental stability and acuity, and upbringing are but some of the factors now getting into the mix. That would seem to be true for juries and trial judges as well.

Fairly early in my Supreme Court tenure one other troubling change occurred. The Court had been entertaining a discussion of "residual doubt" as a reason not to impose death in cases where there was not 100% certainty that the defendant was the perpetrator of the murder. In one such case, my colleagues decided that "residual doubt" was far too vague a concept and should no longer be the subject of discussion,

debate, or part of written opinions. By far the majority of death penalty cases do not involve any question that the defendant was in fact the actor causing death. However, in those cases where there might be a glimmer of doubt, I still believe "residual doubt" is a useful term to explain the decision of a justice to vote against the imposition of death.

My tipping point gradually came from a continued observation that the death penalty was being applied unevenly due to limited local resources and differing views of county prosecuting attorneys on its proper use. At some point I decided to make public my personal view that the time had come to shutter the further use of the death penalty in Ohio. I indicated my belief that it had become a "death lottery," incapable of being fairly and uniformly applied by prosecutors, juries, judges, and the Ohio Supreme Court. At the same time, I promised that while urging the statute's repeal, I would continue to do my best to fairly apply it in cases arising during my remaining tenure on the Court. Consequently, I did not recuse from death cases and was occasionally assigned writing duties up to the end of my term.

In addition to the undeniable unevenness in its application, there are two additional factors that should weigh heavily in favor of repeal. A substantial number of death row inmates were brought to trial before the General Assembly amended the statute to add life in prison without possibility of parole as a substitute for the death sentence. The original act was death, then thirty years as the next step down—and I believe that thirty years could be shortened with "good time." Subsequent to the inclusion of the life sentence option, death sentence verdicts have fallen dramatically.<sup>1</sup> The inescapable conclusion must be that a significant number of those early defendants carrying the death penalty would have been given life without parole had their juries been permitted that option. Since one cannot know which defendant might have been spared under current law, commutation to life in prison for all those defendants remaining in that subset would seem warranted, fair, and just.

Finally, we should lift the burden that befalls our governors with the death penalty. James Rhodes served four terms as governor. In the early months of his first term, Robert Griffin and Donald Rinebolt were executed in the electric chair in 1963. Jim Rhodes never made any known public expression of his discomfort with Ohio's death penalty statutes but miraculously there was not another state execution during the remainder of his years in office. If you knew Jim Rhodes as I did, you would recognize it as his great ability to do the Texas-Two-Step. He did have unsolicited help from the United States Supreme Court in striking Ohio's death statutes, but even while the Ohio statutes were in force another execution never happened on Rhodes's watch and nobody noticed.

It would be eighteen years after enactment when, in 1999, Wilford Berry, "The Volunteer," would become the first person to be put to death applying Ohio's present death penalty statute. Robert Taft was the newly-elected Ohio Governor when Berry

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<sup>1</sup> *Ohio*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/ohio> (last visited Oct. 14, 2019).

waived off all appeals and further efforts to save himself from execution. Taft was left with two options: commute Berry's sentence or allow the sentence to be carried out. More than thirty-six years after Donald Rinebolt's demise in the electric chair, Berry succumbed as a lethal dose of drugs was administered by Ohio's corrections staff. Governors Celeste and Voinovich, each in office for two terms after enactment, under the tutelage of Governor Rhodes, inexplicably avoided the emotional burden of being the last hope for inmates awaiting execution.

During Taft's remaining seven plus years in office, twenty-three more death row inmates joined Wilford Berry's quiet departure; one had his sentence commuted. During Governor Strickland's four-year tenure, another seventeen inmates were executed and five had their death sentences commuted.<sup>2</sup> Those who know Governors Taft and Strickland should be keenly aware of the lifetime burden they quietly carry from having felt tactically and politically boxed-in.

Governor Kasich was there at the beginning. He and Governor DeWine were both members of the Ohio Senate in 1981 when the statute was enacted and both voted for it. The pace of executions slowed markedly during Kasich's eight years in office, with fifteen inmates put to death and seven spared by commutation. Quite possibly, the July 18, 2018 execution of Robert Van Hook during Kasich's last year in office marked the end of Ohio's most recent excursion into the death business. Fifty-six inmates have been executed over the nineteen years between 1999 and 2018.<sup>3</sup>

Shortly after Governor DeWine assumed office in January 2019, a federal magistrate issued an opinion highly critical of Ohio's drug cocktail being used for executions but refused to block the practice.<sup>4</sup> Within days, Governor DeWine announced a cessation of further executions until a suitable solution could be found. Not long after that, California's Governor Newsom announced that none of California's seven hundred plus death row inmates will be executed while he is Governor.

Are we done with death in Ohio? We should be. The statute which we believed in 1981 was carefully crafted, limited in reach, and targeting just the "worst of the worst," has fallen far short in so many ways.

It is unevenly applied by prosecutors, juries, judges, and the Supreme Court—not out of malice or malfeasance, but because measurement and calibration are impossible. Data enabling comparisons of race, mental health, mental acuity, upbringing, or the depth of degradation involved in the crime at bar have never been reported to the Supreme Court. A significant number of death row inmates were convicted at a time when their juries did not have the option of choosing life without parole as the preferred sentence. Others had their final appeal considered by the

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *In re Ohio Execution Protocol Litigation*, No. 2:11-cv-1016 (S.D. Ohio, filed Jan. 21, 2019) (decision and order on motion for reconsideration).

Ohio Supreme Court in the early years when the Court gave scant attention to the statutory mandate to independently weigh the imposition of death in each case.

Will Robert Van Hook become a footnote in Ohio's history, the last person in Ohio to suffer the consequences of his murderous actions by being put to death? It was July 18, 2018 and hardly anyone noticed.

